Supreme Court, U.S.
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No. 80-173

In The
Supreme Court of the United States

October Term, 1980

CHARLES BARMAT,
Appellant,

v.

LLOYD ROBERTSON, Superintendent,
DEPARTMENT OF LIQUOR LICENSES
AND CONTROL, et al.,
Appellees.

**On Appeal from the
Arizona Court of Appeals**

MOTION TO DISMISS

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September 2, 1980

TABLE OF CONTENTS

	Page
Motion To Dismiss	1
Questions Presented	1
Statement Of The Case	3
Argument	5
I. THE APPEAL DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION	5
A. The Arizona Court of Appeals correctly applied the holding of the United States Supreme Court in *LaRue*	5
B. There is no conflict among the federal courts or the state courts on the import of the holding in *LaRue*	8
II. THE FEDERAL QUESTION FRAMED ON APPEAL WAS NOT PROPERLY RAISED BEFORE THE ARIZONA COURT OF APPEALS AND WAS NOT EXPRESSLY PASSED ON	12
Conclusion	15
Appendix	
Appendix A: Order (filed April 9, 1980, in the Arizona Court of Appeals)	A-1
Appendix B: Order (entered May 6, 1980, in the Arizona Supreme Court)	B-1

TABLE OF AUTHORITIES CITED

CASES	Page
Bailey v. Anderson, 326 U.S. 203 (1945)	14
Barmat v. Robertson, ____Ariz.____, 611 P.2d 101 (Ct. App. 1980)	5
Bellanca v. New York State Liquor Authority, 49 U.S.L.W. 2040 (N.Y. June 10, 1980)	12
Blatnik Co. v. Ketola, 587 F.2d 379 (8th Cir. 1978)	10,11
California v. LaRue, 409 U.S. 109 (1972)	6, *passim*
Cardinale v. Louisiana, 394 U.S. 437 (1969)	14
Clark v. City of Fremont, Nebraska, 377 F. Supp. 327 (D. Neb. 1973)	11
Craig v. Boren, 429 U.S. 190 (1976)	7
Doran v. Salem Inn, Inc., 422 U.S. 922 (1975)	6,8
Escheat, Inc. v. Pierstorff, 354 F. Supp. 1120 (W.D. Wis. 1973)	11
Fuller v. Oregon, 417 U.S. 40 (1974)	14
Godchaux Co., Inc. v. Estopinal, 251 U.S. 179 (1919)	14
Guggenheim v. Peto, 415 U.S. 943 (1974)	10,11
Jennings v. Roberts Scott & Co., Inc., 113 Ariz. 57, 546 P.2d 343 (1976)	13
Mullins v. Horne, 120 Ariz. 587, 587 P.2d 773 (Ct. App. 1978)	13
Paladino v. City of Omaha, 471 F.2d 812 (8th Cir. 1972)	6,10
Peto v. Cook, 364 F. Supp. 1 (S.D. Ohio 1973), *aff'd sub nom. Guggenheim v. Peto*, 415 U.S. 943 (1974)	10
Pool v. Peil, 22 Ariz. App. 417, 528 P.2d 168 (1974)	13
Richter v. Department of Alcoholic Beverage Control of California, 559 F.2d 1168 (9th Cir. 1977), *cert. denied*, 434 U.S. 1046 (1978)	9,12
Richter v. Department of Alcoholic Beverage Control of California, 434 U.S. 1046 (1978)	10
Stembridge v. Georgia, 343 U.S. 541 (1952)	14
Street v. New York, 394 U.S. 576 (1969)	14

TABLE OF AUTHORITIES CITED (Cont.)

CASES — *Page*

Tacon v. Arizona, 410 U.S. 351 (1973) 14

CONSTITUTIONAL AND REGULATORY PROVISIONS

United States Constitution

First Amendment ..... 2, *passim*

Fourteenth Amendment 2

Twenty-first Amendment ..... 2, *passim*

State of Arizona Compilation of Administrative Rules and Regulations, Department of Liquor Licenses and Control, Superintendent's Regulations, A.C.R.R.:

A.C.R.R. R4-15-54.1 2

A.C.R.R. R4-15-55.A.3 3

A.C.R.R. R4-15-55.C 3

OTHER AUTHORITIES

Rules of the United States Supreme Court

Rule 15.1(g) 13

Rule 16 1

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MOTION TO DISMISS

Pursuant to Rule 16 of the Rules of the Supreme Court of the United States, appellees respectfully move to dismiss the appeal on the ground that it does not present a substantial federal question and that the federal question sought to be reviewed was not properly raised and was not properly passed on by the state court.

QUESTIONS PRESENTED

1. Whether the state, under the broad authority of the twenty-first amendment, can regulate nude performances on premises licensed to sell intoxicating beverages.

2. Whether a federal constitutional issue not presented to the lower court and first raised in a petition for rehearing in the Arizona Court of Appeals and not expressly passed on, can be reviewed by this Court.

CONSTITUTIONAL PROVISIONS AND RULES

First Amendment, United States Constitution:

Congress shall make no law . . . abridging the freedom of speech . . . .

Fourteenth Amendment, United States Constitution:

[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . .

Twenty-first Amendment, United States Constitution:

Sec. 2—The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

State of Arizona Compilation of Administrative Rules and Regulations, Department of Liquor Licenses and Control, Superintendent's Regulations, A.C.R.R.:

R4-15-54 Clothing Requirements, Employees

No licensee shall, on the licensed premises:

1. Employ or use any person as an entertainer or in the sale or service of alcoholic beverages in or upon the licensed premises while such person is unclothed or in such attire, costume or clothing as to expose to view any portion of the areola of the female breast or any portion of his or her pubic hair, anus, cleft of the buttocks, vulva or genitals;

R4-15-55. Sex Acts Prohibited, Real or Simulated

A. No licensee shall permit, on the licensed premises, any person to perform acts of or acts which constitute or simulate:

. . . .

3. The displaying of any portion of the areola of the female breast, or any portion of his or her pubic hair, anus, vulva or genitals.

. . . .

C. No licensee shall permit any person to remain in or about the licensed premises who exposes to public view any portion of the areola of the female breast or any portion of his or her pubic hair, anus, vulva or genitals.

If any provision of this rule or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or application of the rule which can be given effect without the invalid provision or application, and to this end the provisions of this rule are severable.

STATEMENT OF THE CASE

This is a direct appeal from the final judgment and decree entered on February 22, 1980, by the Arizona Court of Appeals, reversing the decision rendered by the Superior Court of Pima County, Arizona. The judgment entered by the court of appeals directed the affirmance of a ten day period of suspension of the liquor license privileges of Charles Barmat (licensee) for violation of state administrative regulations prohibiting nude performances on premises licensed to sell intoxicating beverages. The licensee's Petition for Review before the Arizona Supreme Court was denied on May 6, 1980.

On August 29, 1975, a ten day period of suspension was imposed on the liquor license issued to Charles Barmat, doing business as the Ranch House Theater. The suspension was ordered by the Superintendent of the Department of Liquor Licenses and Control (Superintendent) based on a finding that the licensee had permitted a totally nude entertainer to perform on the licensed premises in violation

of regulations adopted by the Superintendent and the Arizona Department of Liquor Licenses and Control, appellees herein (department). Jurisdictional Statement, p. 12a.

An appeal from the Superintendent's order of suspension was made to the Arizona State Liquor Board (Board). Administrative hearings were conducted on October 31, 1975, and December 5, 1975. Testimony from the state's witness, Sergeant Jimmy Williams of the Arizona State Department of Public Safety, indicated that the performance in question consisted of the following acts and conduct:

> WILLIAMS:
> Yes, one particular time she [the dancer] approached the edge of the stage, placed her hands on each side of the vagina cavity and took hold of the pubic hair, bent her body in a backward position and pulled upward on the pubic hair and displayed the vagina cavity and the inner portions of it.
>
> * * *
>
> WILLIAMS:
> There was another position which she took — she would back up towards the stage with her back to the stage and place her body in a right angle and take the hands — her hands and put them behind and grasp the cheeks of her buttocks and pull the buttocks widely apart, displaying the anal cleft and the cavity and also the vagina cavity.

Document 9, Clerk's Certification of Record on Appeal, Item 1, pp. 9 and 10, Transcript of Administrative Record.

The Board affirmed the ten day suspension of the licensee's liquor license finding violations of regulations A.C.R.R. R4-15-54.1, R4-15-55.A.3 and R4-15-55.C. Jurisdictional Statement, p. 13a. An appeal was taken by the licensee to the Superior Court of Pima County, Arizona, on December 9, 1975. The court ruled that prior to the suspension of a state-issued liquor license, federal case law required a judicial determination as to whether the conduct in question partook more of gross sexuality than communication. Jusidictional Statement, pp. 17a, 18a.

At the hearing before the superior court to determine whether the conduct constituted gross sexuality or communicative expression, the department took the position that a judicial hearing was not constitutionally mandated and that the decision of the Board was supported by the evidence and testimony received at the administrative hearing. The department presented no additional evidence. The court ruled that the department had not met its burden of proving that the performance in question partook more of gross sexuality than of communication, and reversed the ten day suspension. Jurisdictional Statement, pp. 19a, 20a.

The superior court's judgment was appealed to the Arizona Court of Appeals which reversed the lower court's ruling and held that the department could constitutionally prohibit the serving of liquor in establishments providing nude dancing. The court of appeals found no first amendment requirement that a judicial determination must be made that nude dancing was more gross sexuality than communicative expression before a sanction may be imposed. *Barmat v. Robertson,* _____ Ariz. _____, 611 P.2d 101 (Ct. App. 1980). The licensee's Motion for Rehearing before the court of appeals was denied on April 9, 1980. Appendix, p. A-1. The Petition for Review before The Arizona Supreme Court was denied on May 6, 1980. Appendix, p. B-1.

ARGUMENT

I. THE APPEAL DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION.

A. The Arizona Court of Appeals correctly applied the holding of the United States Supreme Court in *LaRue.*

The Arizona Court of Appeals decision is correct. The licensee argues that a judicial hearing to determine whether nude dancing constituted more gross sexuality than communication is constitutionally mandated before any liquor license can be suspended. Case law interpreting a state's

authority to regulate the circumstances of sales of intoxicating beverages under the twenty-first amendment firmly establishes that a state may totally prohibit nude dancing in any establishment licensed to sell alcoholic products.

This Court first examined the relationship between the first and twenty-first amendments in *California v. LaRue*, 409 U.S. 109 (1972). The plaintiffs in *LaRue* brought a declaratory judgment action seeking to have the "nude dancing" regulations of the California Department of Alcoholic Beverage Control declared unconstitutional as violative of the First and Fourteenth Amendments to the United States Constitution. The regulations at issue in *LaRue* were almost identical to the regulations at issue in this appeal.

In ruling on the constitutionality of the California regulations, the Court balanced the power of the states to regulate and control the sale of liquor under the twenty-first amendment against the infringement of first amendment rights which could result. This Court held that California's rules and regulations were facially constitutional. In addition, the twenty-first amendment was recognized as conferring more than the usual state authority over public health. *Id.* at 114.

LaRue held that the limitations imposed by the first amendment, through the fourteenth amendment, upon the states' power to regulate expression were substantially relaxed in the context of the sale of liquor. First amendment limitations were relaxed to the extent that the states could wholly proscribe sexually-oriented entertainment not otherwise illegal or obscene. *Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975)[1] ; *Paladino v. City of Omaha*, 471 F.2d 812, 814 (8th Cir. 1972).

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[1] In *Salem Inn*, this Court concluded that the power of the states to regulate the sale of liquor under the twenty-first amendment outweighed "any First Amendment interest in nude dancing." Nude dancing could be totally banned by a state as a part of its liquor license program. 422 U.S. at 932-33.

Cognizant that its decision would in fact prohibit otherwise constitutionally protected forms of expression under the first amendment, the Court stated that such would not outweigh the authority of the state to absolutely prohibit nude conduct under the twenty-first amendment for the reason that: "California has not forbidden these performances across the board. It has merely proscribed such performances in establishments that it licenses to sell liquor by the drink." *LaRue,* 409 U.S. at 118. Arizona, likewise, has not forbidden nude conduct "across the board," but has merely proscribed such performances in establishments licensed to sell liquor by the drink. A.C.R.R., R4-15-54.1, R4-15-55.A.3 and R4-15-55.C.

The acts and conduct set forth in California's nude dancing regulations were defined by the Court as performances partaking more of gross sexuality than of communication. 409 U.S. at 118.[2] California's regulations were held to be constitutional. Challenges to nude dancing regulations are not required to result in judicial hearings as to whether the performances in question partook more of gross sexuality than of communication. This Court has never wavered in its adherence to *LaRue.* Neither of the United States Supreme Court cases cited by the licensee constitutes an erosion of the principles enunciated in *LaRue.*

In *Craig v. Boren,* 429 U.S. 190 (1976), this Court was confronted with gender-based statutory provisions prohibiting the sale of beer to males under the age of 21 and to females under the age of 18. The Court found the statutes constituted a denial of equal protection in violation of the fourteenth amendment. The statistics upon which the state of Oklahoma had based its gender-based classifications were found to be simply too loose-fitting concerning the drinking tendencies of aggregate groups to alter the application of equal protection standards. *Id.* at 208, 209. A clear distinction was made between the prohibited sexual conduct permitted to be regulated under authority of the

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[2] Arizona's nude dancing regulations, which are essentially the same as California's must be defined likewise.

twenty-first amendment in *LaRue* and the invidious discrimination in violation of the equal protection clause of the fourteenth amendment in *Craig*.[3] *Craig* did not weaken this Court's holding in *LaRue*.

Doran v. Salem Inn, Inc., 422 U.S. 922 (1975), is factually distinguishable from *LaRue*. In *Salem Inn* a town ordinance prohibiting topless dancing in both licensed and unlicensed establishments was challenged by several liquor licensees. The Court affirmed the issuance of preliminary injunctive relief, indicating that if the ordinance had been drafted as to apply only to places serving liquor it would have been constitutionally valid.[4]

There is apparently no dispute between the parties to this appeal that the entertainment in question was performed totally nude. *See* Jurisdictional Statement, pp. 12, 13 and 17. The department's regulations do not materially differ from those found facially constitutional in *LaRue*. Pursuant to this Court's holding, the conduct set forth in Arizona's regulations partakes more of gross sexuality than communicative expression and may constitutionally be prohibited by the state in establishments licensed to sell intoxicating beverages. *See LaRue*, 409 U.S. at 118. The Arizona Court of Appeals is fully in accord with the Court's holding in *LaRue*.

B. There is no conflict among the federal courts or the state courts on the import of the holding in *LaRue*.

The Court of Appeals for the Ninth Circuit has ruled that a liquor licensee was not entitled to a judicial determi-

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[3] "[Despite the holding in *LaRue*], the Court has never recognized sufficient 'strength' in the [twenty-first] Amendment to defeat an otherwise established claim of invidious discrimination in violation of the Equal Protection Clause." *Craig*, 429 U.S. at 207.

[4] Even if we assume that the State of New York has delegated its authority under the Twenty-first Amendment to towns such as North Hempstead, and that the ordinance would therefore be constitutionally valid under *LaRue*, *supra*, if limited to places dispensing alcoholic beverages, the ordinance in this case is not so limited.

Salem Inn, 422 U.S. at 933.

nation as to whether entertainment was more gross sexuality than communicative expression. *Richter v. Department of Alcoholic Beverage Control of California*, 559 F.2d 1168 (9th Cir. 1977), *cert. denied*, 434 U.S. 1046 (1978).[5]

The appellant in *Richter* had been cited for violations of the same regulations which were declared to be constitutional in *LaRue*. The California Department of Alcoholic Beverage Control determined in an administrative proceeding that Richter's license should be revoked. His petitions for review were denied by the California Court of Appeals and the California Supreme Court. He then commenced an action in federal district court.

Richter argued that *LaRue* required that the specific application of the regulation prohibiting nude dancing in liquor establishments must be judicially reviewed to determine if the performance in question contained more gross sexuality than communication. That was the only issue presented to the ninth circuit; it is the same issue before this Court. The circuit court held that since *LaRue* decided nude dancing was properly proscribed conduct when performed in establishments serving liquor, there was no need for a judicial determination that the entertainment in question was more "gross sexually" than "communicative expression." *Richter*, 559 F.2d at 1173. The court found that the appellant had "failed to raise a substantial consti-

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[5] Appellant argues that despite the holding of facial constitutionality in *LaRue*, the courts still have the responsibility to review the application of Rule 143.3 [California's rule prohibiting nude conduct on premises licensed to sell alcoholic beverages] to specific concrete situations even where the situation is one which is clearly encompassed within the perimeters of the Rule. Thus, although the appellant admits to having nude dancing in his establishment, he contends that before his license may constitutionally be revoked, it must be determined that the nude dancing was more a form of 'gross sexuality' than communicative expression.

Richter, 559 F.2d at 1171.

tutional question." *Id.* The appellant's application for writ of certiorari was denied by the United States Supreme Court. *Richter v. Department of Alcoholic Beverage Control of California*, 434 U.S. 1046 (1978).

The Court of Appeals for the Eighth Circuit recently concluded that the state's broad regulatory power over liquor within its borders, under the twenty-first amendment, outweighed a tavern owner's first amendment interest in presenting sexually explicit entertainment. *Blatnik Co. v. Ketola*, 587 F.2d 379 (8th Cir. 1978). In *Blatnik*, operators of licensed liquor establishments challenged the constitutionality of a city ordinance which prohibited semi-nudity, nudity and other sexually explicit entertainment in on-premises liquor establishments. The ordinance was almost identical to the department's regulations at issue in this appeal. The eighth circuit affirmed the district court's grant of a motion for summary judgment under the authority of *LaRue* and *Paladino v. City of Omaha*, 471 F.2d 812 (8th Cir. 1972).[6]

The licensee's claim that *Peto v. Cook*, 364 F. Supp. 1 (S.D. Ohio 1973), *aff'd sub nom. Guggenheim v. Peto*, 415 U.S. 943 (1974), conflicts with *LaRue* is incorrect. In *Peto*, the regulations challenged sought to regulate not only sexually explicit entertainment but literature, advertising materials and language in both on and off premises liquor establishments. The district court correctly noted the distinction between permissible regulation of nude entertainment in licensed liquor establishments under *LaRue* and the "presumptively expansive First Amendment rights" in protecting the written word. *Peto*, 364 F. Supp. at 2-3.

That portion of the regulation which sought to regulate printed materials was held unconstitutional. Those portions of the regulation which prohibited live nude entertainment on premises licensed to sell intoxicating beverages were held constitutional. *Peto*, 364 F. Supp. at 5. This distinction

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[6] In *Paladino* the eighth circuit upheld the facial constitutionality of ordinances bearing a basic similarity to the regulation upheld in *LaRue*.

was enunciated by the Court of Appeals for the Eighth Circuit in *Blatnik v. Ketola*, 587 F.2d 379, 382-83 (8th Cir. 1978), and affirmed in *Guggenheim v. Peto*, 415 U.S. 943 (1974).

The Arizona regulations involve not printed materials but live entertainment recognized by *LaRue* and *Peto* as within the permissible scope of state regulation.

In *Escheat, Inc. v. Pierstorff*, 354 F. Supp. 1120 (W.D. Wis. 1973), the district court reviewed a city ordinance which provided for the revocation of a liquor license upon a finding that the licensee kept or maintained "a disorderly or riotous, indecent or improper house." *Id.* at 1122 n.1. Unlike the statutory scheme at issue in *LaRue*, and the Arizona regulations, the city ordinance in *Escheat* did not identify specific prohibited nude conduct. The district court held that it was necessary to make a determination of whether first amendment freedoms of expression were being prohibited by what amounted to an overly broad statutory prohibition. The judicial determination required by the court in *Escheat* was based on the interpretation of an ordinance which bears no resemblance to the Arizona regulations.

The final citation by the licensee, in support of his contention that there are conflicting decisions rendered by federal district courts, is *Clark v. City of Fremont, Nebraska*, 377 F. Supp. 327 (D. Neb. 1973). *Clark*, far from providing support for the licensee, found that the ordinance which proscribed showing human genitals, pubic area or buttocks, with less than a full opaque covering, *"falls within the unrestricted regulatory area permissible under* LaRue *and such performances may be proscribed in liquor establishments without prompt judicial review." Id.* at 342 (emphasis added).

The district court ruled that judicial review is required only as to those proscribed performances involving topless dancing per se and body painting. Those performances did not fall "within the gross sexual entertainment subject to unrestricted regulation under *LaRue*." *Clark*, 377 F. Supp.

at 342. The conduct at issue before this Court involves the showing of female genitals, pubic area and buttocks—that "unrestricted regulatory area" found permissibly regulated by the state in *Clark*.

The New York Court of Appeals recently declared unconstitutional the prohibition of topless dancing at premises licensed by state liquor authorities. Its holding, however, was limited to topless dancing. As such the New York court does not contradict the decision issued by the Arizona Court of Appeals or any of the previously cited federal cases. *Bellanca v. New York State Liquor Authority*, 49 U.S.L.W. 2040 (N.Y. June 23, 1980).

II. THE FEDERAL QUESTION FRAMED ON APPEAL WAS NOT PROPERLY RAISED BEFORE THE ARIZONA COURT OF APPEALS AND WAS NOT EXPRESSLY PASSED ON.

The licensee framed this appeal in terms of *LaRue's* rational basis test for nude dancing regulations.[7] It is alleged that the department failed to set forth a rational basis for the nude dancing regulations at the time of adoption and, therefore, the regulations do not meet constitutional requisites under *LaRue*. *See* Jurisdictional Statement, pp. 15-16, 18-19, 24-27 and 39.

The licensee did not raise this issue at the administrative hearing in 1975. He did not raise the issue on appeal or in his reply brief to the Arizona Court of Appeals. Only after the court of appeals issued its decision on February 22, 1980, was the issue of the rational basis for the regulations raised by the licensee in his Motion for Rehearing. The Arizona Court of Appeals never ruled on the rational basis test

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[7] *LaRue* upheld, as rational, the conclusion of the California Department of Alcoholic Beverage Control that sexual performances and the sale of liquor by the drink ought not to occur on licensed premises. 409 U.S. 395-97. *See Richter v. Department of Alcoholic Beverage Control*, 559 F.2d 1168, 1173 (1977): "If it is concluded, as it apparently was in *LaRue*, that the combination of nude dancing and alcoholic inebriation increases to an unacceptable level the likelihood of illegal and/or disorderly conduct, the state can properly prohibit the combination of the two."

for the regulations at issue. The licensee has not argued otherwise.[8]

The Arizona Court of Appeals ruled only on the narrow question of the necessity for a judicial hearing to determine whether nude dancing was more grossly sexual than communicative in nature before the imposition of disciplinary sanctions on a liquor licensee. The Arizona Court of Appeals was not properly presented with the issue of the rational basis of the regulations and did not pass on that issue.

Arizona case law has long established the principle that an issue not raised in the pleadings or arguments before the trial court cannot be raised for the first time on appeal. *Jennings v. Roberts Scott & Co., Inc.*, 113 Ariz. 57, 59, 546 P.2d 343, 345 (1976); *Mullins v. Horne*, 120 Ariz. 587, 592, 587 P.2d 773, 778 (Ct. App. 1978); *Pool v. Peil*, 22 Ariz. App. 417, 419, 528 P.2d 168, 170 (1974).

The licensee did not raise the federal constitutional issue as required by state precedent. The issue was first raised in a motion for rehearing addressed to the Arizona Court of Appeals.

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[8] The Rules of the Supreme Court of the United States specifically require that on appeal the jurisdictional statement of the appellant shall contain:

> (g) A *concise* statement of the case containing the facts material to consideration of the questions presented. The statement of the case shall also specify the stage in the proceedings (both in the court of first instance and in the appellate court) at which the questions sought to be reviewed were raised; the method or manner of raising them; and the way in which they were passed upon by the court."

Rule 15 (1) (g).

The licensee's jurisdictional statement did not specify the stage in the proceedings at which the specific question sought to be reviewed was raised, the manner or method of raising the issue or the way in which the question was passed upon by the court. *See* Jurisdictional Statement, p. 15. The question ruled on by the Arizona Court of Appeals is not the same question presented to this Court on appeal.

A substantial federal question must be raised at the proper point in the state court proceeding and if first presented in a petition for rehearing it comes too late unless the court actually entertains the petition and passes upon the point. *Godchaux Co., Inc. v. Estopinal,* 251 U.S. 179, 181 (1919). If the issue was not presented in such a manner as to have necessarily been decided by the court from which the appeal was taken, the United States Supreme Court has no power to consider it. *Street v. New York,* 394 U.S. 576, 581-82 (1969).

The Supreme Court has often stated that when "the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts." *Street v. New York,* 394 U.S. 576, 582 (1969). *See Fuller v. Oregon,* 417 U.S. 40, 50 n.11 (1974), and *Bailey v. Anderson,* 326 U.S. 203, 206-07 (1945). The rule that the Supreme Court may review only those issues properly presented to the state court is jurisdictional. *Tacon v. Arizona,* 410 U.S. 351, 352 (1973), citing *Cardinale v. Louisiana,* 394 U.S. 437 (1969).

Neither the Arizona Court of Appeals nor the Arizona Supreme Court ruled on the issue presented to this Court on appeal. The appeal should be dismissed for failure to properly raise the federal question at the state court level and for the reason that it was not expressly passed on by the Arizona Court of Appeals. *Cf. Stembridge v. Georgia,* 343 U.S. 541, 547 (1952).[9]

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[9] The United States Supreme Court dismissed an improvidently granted petition for certiorari where the federal constitutional issue was not raised in the trial court, as required by state law, but was first raised in a petition for rehearing addressed to the state intermediate court. The Georgia Supreme Court had refused without opinion to hear the case.

CONCLUSION

The appellees respectfully submit that the Arizona Court of Appeals correctly applied this Court's ruling in *LaRue*. The refusal of the court of appeals to find a constitutional requirement that a judicial determination must follow the suspension of a liquor license for violation of nude dancing regulations prior to the imposition of a period of suspension is in accord with prior rulings by this Court, federal courts and other state courts. The federal constitutional issues presented by appellant are unsubstantial and the appeal should be dismissed. Furthermore, the failure of appellant to raise the issue of the rational basis for the challenged regulations at the appropriate time in the state courts and the failure of the court of appeals to expressly pass on the issue involved in this appeal must result in dismissal for want of jurisdiction.

Respectfully submitted,

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September 2, 1980

APPENDIX A

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

CHARLES BARMAT, Plaintiff/Appellee, v. LLOYD ROBERTSON, Superintendent, DEPARTMENT OF LIQUOR LICENSES and CONTROL; ARIZONA DEPARTMENT OF LIQUOR LICENSES and CONTROL, an Arizona administrative agency, Defendants/Appellants.	2 CA-CIV 3299 O R D E R (Pima County Superior Court Cause No. 158329) [Filed April 9, 1980]

IT IS ORDERED that the Appellee's Motion for Rehearing is DENIED.

Dated: April 9, 1980.

/s/_____
James D. Hathaway,
Chief Judge.

/s/_____
Lawrence Howard, Judge.

/s/_____
James L. Richmond, Judge.

[verification of mailing omitted in printing]

APPENDIX B

SUPREME COURT
STATE OF ARIZONA

CHARLES BARMAT, Appellee, v. LLOYD ROBERTSON, Superintendent, DEPARTMENT OF LIQUOR LICENSES and CONTROL; ARIZONA DEPARTMENT OF LIQUOR LICENSES and CONTROL, an Arizona administrative agency, Appellants.	May 7, 1980 Supreme Court No. 14864-PR Court of Appeals No. 2 CA-CIV 3299 Pima County No. 158329

The following action was taken by the Supreme Court of the State of Arizona on May 6, 1980 in regard to the above-entitled cause:

"ORDERED: Petition for Review = DENIED."

Record returned to the Court of Appeals, Division Two, Tucson, this 7th day of May, 1980.

MARYANN HOPKINS-YOUNG,
Clerk

By /s/_____
Deputy Clerk

[verification of mailing omitted in printing]